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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 699

JOSEPHINE G. BRAUN,

Petitioner,

v.

MORRIS W. TAUB and MARIE A. TAUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Josephine G. Braun, prays that a writ of certiorari issue to review the judgment of the Court of Appeals, entered in the above entitled cause on the 17th day of January, 1949, affirming the judgment, of the District Court for the Second District of New York, entered on the 13th day of August, 1948, on an order granting defendant's motion for summary judgment.

STATEMENT.

This action was commenced, by the service and filing of a summons and complaint, on or about the 9th day

of April, 1948. Issue was joined, by the service of an answer, on or about the 21st day of April, 1948. By notice of motion the defendants moved for summary judgment dismissing the complaint upon the merits. The motion was based solely upon the matter contained in the answer labelled "Third Defense", wherein it is asserted that a judgment, rendered by the Supreme Court of the State of New York, "is *res adjudicata* and determinative of the allegations of the complaint in favor of the defendants". The motion was granted by order and judgment of the District Court, entered on the 13th day of August 1948, from which the plaintiff appealed. It is to review the judgment, of the Court of Appeals, entered on the 17th day of January 1949 affirming the judgment of the District Court, that issuance of a writ of certiorari is herein sought.

Facts Pertinent to the State Court Action.

Annexed to the affidavit of John O'Brien (fols. 49-113) made in opposition to defendants' motion for summary judgment, in the District Court, are Exhibits marked A, B, C, and D. The printed record, before the Court of Appeals, contained Exhibits A, B, and D. By stipulation (fols. 157-159) Exhibit C was handed up on the argument of the appeal and referred to, in briefs, as though incorporated in the printed record. The folio references in the said affidavit of John O'Brien relate to said Exhibit C.

Exhibit C is a certified copy of a remittitur of the Appellate Division of the Supreme Court of the State of New York and contains certified copies of all the papers, including the pleadings, having to do with the rendering of the state court judgment asserted,

by the defendants, in the District Court action, to be *res adjudicata* (fols. 11, 12). For the purpose of brevity, the said exhibits will be hereinafter refered to by their respective alphabetic designation without further identifying them as "annexed to the affidavit of John O'Brien". In the said affidavit the facts and procedural steps taken in the procurement and rendering of the state court judgment are recited (fols. 63-80). It is not intended to cover the same ground here but reference is now made to certain features in the related papers and proceedings in the exercise of caution, in view of the finding, by the Court of Appeals, that the action, in the state court, was on a written contract.

Exhibit C (fols. 127-159) contains a copy of the amended complaint, in the state court action, in which the Taubs aver that they requested of the defendant (Braun) a postponement of the day set for performance in the written contract, from the 27th day of December, 1944 to December 29th, 1944, and that the defendant granted such adjournment but changed the day, from December 29th, 1944 to January 4th, 1945 (fols. 131, 132 of Exhibit C). Then in paragraph marked "Tenth", the amended complaint alleges that, on the 2nd day of January, 1945, the time of closing was again changed from the 4th day of January, 1945, without date (fol. 135 of Exhibit C).

In paragraph marked "Twelfth" an agreement is set forth again changing the time of closing to the 24th day of January, 1945 (fol. 136 of Exhibit C).

Thus it appears that the action in the state court was founded upon Braun's refusal to perform the agreement, made on the 22nd day of January, 1945, to close on the 24th day of January, 1945. Moreover, the said agreement to close on the 24th day of Jan-

uary, 1945 is identified, in the affidavit, of the attorney for the Taubs, made in support of the motion for summary judgment, in the District Court, as the agreement sued upon (fols. 18-19). Nowhere, in the amended complaint, is it alleged that Braun failed to perform on the due day of the written contract.

In *Clark* v. *Dales,* 20 Barb. 42, 64, the highest court in the State of New York said:

> "The effect of such enlargement is to substitute or adopt the extended time for the time specified in the original contract. It then stands as a new agreement wherein the mutual promises furnish a good consideration. It is a new agreement substituted for the former one by which the parties agree in all respects as formerly, except as to the time of performance which they then fix for a future period. And it is under the new substituted agreement that redress must be sought in case either should fail or refuse to perform."

It is uncontroverted, that the state court action was on an agreement, not alleged to be in writing (fol. 136 of Exhibit C), which modified a written contract (fols. 146-155 of Exhibit C), for the sale of land and that the said written contract contained a clause to the effect that it may not be changed orally (fol. 153 of Exhibit C).

The record shows that the first procedural step, taken in the state court action, was a motion, by Braun at Special Term, to dismiss the amended complaint for insufficiency and the statute of frauds, a proceeding substituted in the State of New York for the more familiar demurrer. The motion was denied and the order entered thereon, upon an appeal to the

Appellate Division, was affirmed without opinion, with leave to defendant to answer (fol. 94 of Exhibit C). The Taubs, at all times since, have claimed that the order, denying this motion to dismiss and its affirmance, established the law of the case, making the denials contained in the answer subsequently interposed ineffective and the defenses set up therein unavailable. Such is the theory upon which every subsequent proceeding taken in the action by the Taubs is predicated, in which they have been granted orders

(1) to strike out the affirmative defenses contained in Braun's answer to their amended complaint (178-179 Exhibit C).

(2) for the summary judgment they now claim is res-adjudicated (70-72 of Exhibit C).

(3) punishing the defendant Braun for contempt by imprisonment (fols. 35-41) and

(4) directing the Sheriff to convey to them the property in controversy (fols. 42-48).

A supervening decision, of the same appellate court, now clearly indicates that the question, presented on Braun's motion to dismiss the amended complaint, was misapprehended and that the motion should have been granted. The record discloses that in opposition to the motion the Taubs relied on two cases, viz.: *Imperator* v. *Tull,* 228 N. Y. 447, decided April 13, 1920, and *Thomson* v. *Poor,* 147 N. Y. 402, decided November 26, 1895, both of which were actions based squarely on estoppel. The question presented, on Braun's motion, had no relevancy whatever to the theory of estoppel enunciated in the cited cases (fols. 94, 178 of Exhibit C).

The question and the only question presented on the motion was whether a written contract (fols. 38-47 of Exhibit C), for the sale of land, which contained a clause that it may not be changed orally (fol. 45 of Exhibit C) could be changed orally, under Section 282 of the Real Property Law. Said Section 282 became effective on the 5th day of April 1944, long after the cases, relied on by the Taubs, had been decided. On the same day, April 5, 1944, Section 33c was added to the New York Personal Property Law and is identical, word for word, with said Section 282 of the Real Property Law. On December 20, 1948, and after the decision of the appeal herein, the same Appellate Court, which affirmed the order, denying Braun's motion to dismiss for insufficiency and the statute of frauds, decided an appeal in the case of *Green* v. *Doniger,* 274 App. Div. 476, and in an unanimous opinion held that a cause of action, for a bonus alleged to be due under an oral contract of employment, should have been dismissed as insufficient in law, when it appeared that the parties had entered into a written contract of employment, which contained a provision that it may not be changed orally, and that to hold such an oral agreement effectual would nullify the provision in Section 33c of the Personal Property Law that an executory agreement shall be ineffective, unless in writing and signed, to change or modify or discharge a written agreement which contains a provision that it cannot be changed orally.

The opinion in *Green* v. *Doniger, supra,* is the first opinion of the Appellate Division of the Supreme Court of the State of New York as to the interpretation to be placed upon said Section 33c of the Personal Property Law and said Section 282 of the Real Property Law.

Statutes Involved.

The part of Section 282 of the New York Real Property Law, effective April 5, 1944, made applicable to the written contract by reason of the clause therein contained, provides:

> "1. An executory agreement hereinafter made shall be ineffective to change or modify, or to discharge in whole or part, a written agreement or other written instrument hereinafter executed which contains a provision to the effect that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought or by his agent."

Section 33c of New York Personal Property Law, also effective April 5, 1944 is identical with the above Section 282 of the Real Property Law.

Rule 113 of the New York Rules of Civil Practice permits the granting of summary judgment in certain specified equity actions. That part said Rule 113 applicable is subdivision 7 which provides:

> "For specific performance of a contract in writing for the sale and purchase of property including such alternative and incidental relief as the case may require".

Section 472 of the New York Civil Practice Act provides:

> Definition of Judgment:
>
> A judgment is the determination of the rights of

the parties in an action and may be either interlocutory or final.

Section 510 provides:

> No judgment shall be a charge upon the real property of any person unless and until he be designated by his name in a docket of such judgment in the office of the Clerk in the county where such property is located.

Section 621 provides:

> Entry of judgment or order of Appellate Division.
>
> The judgment, if any, rendered or directed pursuant to any such order shall be entered by the Clerk to whom the certified copy of such order and the case or papers are so transmitted. A certified copy of such order the judgment entered thereon and the case or papers so transmitted shall constitute the judgment roll and remain on file in the office of such clerk.

Section 503 provides:

> A proceeding to enforce or collect a final judgment cannot be taken until the judgment roll is filed.

Questions Presented.

Only one question was involved on the appeal, viz.: whether a judgment of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Bronx, on the 13th day of October 1945, is *res adjudicata* and determinative of the allegations of the complaint, as stated in the matter, contained in defendants' answer, labelled "Third Defense" (fols.

11-12). In appellant's brief, objections to the judgment as a bar were set forth as follows:

> "The plaintiff contends that the judgment relied upon by the defendants as *res adjudicata,*
>
> (1) is not an existing final judgment,
>
> (2) was not rendered upon the merits,
>
> (3) by a court of competent jurisdiction,
>
> (4) on the same issues involved in the action here."

The questions presented are as follows:

1. Is the judgment claimed as a bar an existing final judgment?

2. Was said judgment rendered on the merits?

3. Did the state court have power to render the judgment?

4. Was said judgment rendered on the same issues as involved in the action here?

Specification of Errors.

1. The Court of Appeals erred in finding that "the state court action was for specific performance of a written contract for the sale of a parcel of land" in that the said finding is probably in conflict with applicable local decisions.

2. The Court of Appeals erred in finding the fourth point bad, on the ground that the parties are concluded by the identical claim in both actions, in

that such finding is probably in conflict with applicable local decisions.

3. The Court of Appeals erred in finding the third point, addressed to the competency of the Court to be bad in that said finding is probably in conflict with applicable local decisions.

4. The Court of Appeals erred in finding the judgment of the Appellate Division entered on June 13th 1946 as amended by the resettled order of July 1, 1946 is a final determination, in that said finding conflicts with applicable local decisions.

5. The Court of Appeals erred in affirming the judgment of the District Court upon a finding that another determination, separate and distinct from the judgment set up in the matter labelled "Third Defense", in defendants answer, was the final judgment and said affirmance is probably in conflict with local decisions, is probably untenable and in conflict with the weight of authority.

Reasons for Granting Writ.

A supervening decision of the Appellate Division of the Supreme Court of the State of New York, is controlling and is determinative of the question involved in the District Court action, in favor of your petitioner, the plaintiff, therein.

There is a conflict in the decision rendered by the Court of Appeals with the decisions of the state court upon questions of local law.

The method pursued, in the action in the state court, by which the short cut to justice was accomplished therein, may probably involve an avoidance

of procedural guarantees protected against state invasion, by the Fourteenth Amendment to the Constitution of The United States.

For these reasons it is respectfully submitted that the petition should be granted.

Dated: New York, April 5, 1949.

Respectfully submitted,

DAVID HAAR,
Attorney for Petitioner,
270 Broadway,
New York City.

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OCTOBER TERM, 1948.

No.

JOSEPHINE G. BRAUN,

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v.

MORRIS W. TAUB and MARIE A. TAUB,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

POINT I.

The supervening decision of the Appellate Division of the New York Supreme Court First Judicial Department is determinative of the rights of the parties under the contract sued upon in the state court.

In *Green* v. *Doniger,* 274 App. Div. 476, the court, in interpreting Section 33c of the New York Personal Property Law which is identical, word for word, with Section 282 of the New York Real Property Law, held that a provision, in a contract, prohibiting a change orally, precluded the maintenance of all actions

based on oral changes on any theory; the purpose of the clause being to prevent such changes. Under this decision the action, brought by the Taubs, in the Supreme Court of the State of New York, for specific performance of an oral agreement, modifying a written contract, which contained a clause that it may not be changed orally was not maintainable and should have been dismissed on Braun's demurrer.

In *Blair* v. *Commissioner,* 300 U. S. 5, 9, this court held that a supervening decision, of the state court, interpreting a local law, cannot be justly ignored in a subsequent proceeding, so far as it is found that the local law is determinative of any material point in controversy and that a decision of the state court upon a question of local law is final.

In *Richardson* v. *City of Boston,* 60 U. S. 263, this court said:

> "Title is often a question of mixed law and fact—and a party is not concluded by an erroneous opinion of the court pronounced in a former case."

The same reasoning should apply to an erroneous prior decision in the same case.

POINT II.

The action in the state court was on an oral agreement.

The decision of the Court of Appeals contains a statement that could only be based on a misapprehension of the nature of the controversy in the state court action and the question basically involved in all the proceedings had therein.

The finding that the action in the state court was on a written contract is (1) inconsistent with the facts of the record and (2) establishes an erroneous assumption which precluded a proper consideration of appellant's contentions (fols. 89-101).

The allegations, contained in the amended complaint, in the state court action, are controlling, on the question whether the action was on a written or oral agreement and the allegations therein state an action, based on the theory of estoppel, and founded upon an agreement changing the time of performance fixed in the written contract. Nowhere is the said agreement alleged to be in writing. An estoppel, based on the cases relied on by the Taubs, is never invoked to validate or legalize an agreement in writing. The facts show that the action, in the state court, was on an oral agreement which, the Taubs asserted, by reason of an estoppel, modified the original written contract, notwithstanding a clause in said written contract expressly prohibiting oral changes (fol. 153 of Exhibit C) and making applicable Section 282 of the New York Real Property Law (fols. 69-70). The finding, that the action in the state court was on a written contract, was highly prejudicial to the appellant's contentions, for it shows that the Court of Appeals misapprehended the gist of the appellant's resistance to the state court's judgment to the extent of precluding consideration of appellant's objections directed to the competency of the state court (1) to entertain the action and (2) to entertain the application under subdivision 7 of the Rule 113 of the New York Rules of Civil Practice (fols. 88-108).

In a court of justice it is necessary to file a complaint, which is sufficient to give the court juris-

diction, and if a complaint is not filed which is sufficient to initiate the proceedings subsequent acts of the court are futile and no rights are adjudicated. Upon the appeal, the appellant did not contend that the state court was lacking in general power to entertain actions for specific performance of written contracts but contended that the amended complaint, in the state court action, failed to allege facts showing a compliance with Section 282 of the Real Property Law and that the showing of such facts was necessary, as a condition precedent, to the acquisition of jurisdiction when an action, as in this case, is on an agreement, changing a written contract for the sale of land which contains a provision that it may not be changed orally (fols. 89-91). Again, upon the appeal, the appellant contended that the state court action was for specific performance of an oral agreement, upon which the state court had no power to grant summary judgment. Subdivision 7 of Rule 113 of the New York Rules of Civil Practice, under which the application, for the summary judgment in the state court, was made (fol. 89 of Exhibit C) is not available for specific performance of an oral contract (*Tracy* v. *Danzinger,* 249 App. Div. 46; *Fiscella* v. *Fridman,* 169 Misc. 329; *Bimberg* v. *Unity C & A Co.,* 151 Misc. Rep. 442).

POINT III.

The judgment of the state court was not an existing final judgment.

The order striking out defenses is not a final order (*Etri Childrens Aid Society,* 266 N. Y. 407; *Hawkes* v. *City of Buffalo,* 295 N. Y. 822). The judgment was rendered in the state court action on such an intermediate order and therefore the judgment does not operate as an estoppel in any subsequent suit, under any recognized doctrine of *res adjudicta* or estoppel by judgment (*Paddock* v. *Springfield Fire & Marine Insurance Co.,* 12 N. Y. 591; *Orange National Bank* v. *2233 Webster Avenue Corporation,* 257 N. Y. 549; *Henry* v. *Vintschger,* 260 N. Y. 578).

The judgment, rendered in the state court action, the record shows, was based on a sequence of orders, one made the foundation of the other so that if the first one (fol. 174 of Exhibit C) denying Braun's motion to dismiss the amended complaint was erroneous, all are. Upon the authority of *Green* v. *Doniger, supra,* there is no question that said order denying Braun's motions was erroneous. Moreover an order made by the state court at Special Term is not *res adjudicata* (*Bannon* v. *Bannon,* 270 N. Y. 284) and the order denying defendant's motion to dismiss the amended complaint did not constitute the law of the case, as far as an appellate court is concerned, and does not preclude a review in an appellate court (*Walker* v. *Gerli,* 257 App. Div. 249). Cases cited in the record show that the order striking out the defenses was erroneous (fols. 102-105).

POINT IV.

The judgment in the state court action was not rendered on the merits.

A judgment, rendered upon a ruling, which passed only on a technical defect in the pleading, is not on the merits and is not *res adjudicata* (*Buick* v. *Cohn-Hall-Marx Co.*, 283 N. Y. 99; *Maine Tr. Corp.* v. *Switzerland C. I. Co. of Zurich*, 263 N. Y. 139; *People ex rel. Village of Chateaugay* v. *Public Service Commissioners of New York*, 225 N. Y. 232; *Good Health Dairy Products Corporation of Rochester* v. *Emery*, 275 N. Y. 14; 112 A. L. R. 401). Moreover, the Taubs have not attempted to show the particular point or question, as to which they claim estoppel in the action here, that was determined by the decision in the state court action, yet they must assume the burden of proving that not only the judgment but the particular point or question, as to which they claim estoppel, was in issue and determined in the state court action (*Maine Transit Co.* v. *Switzerland General Insurance Company of Zurich, supra; People ex rel. Village of Chateaugay* v. *Public Service Commissioners of New York, supra*). Technical defects in the pleading of an adversary, are not available to a plaintiff upon an application under Rule 113 for the entry of summary judgment (*Curry* v. *Mackenzie*, 239 N. Y. 267).

POINT V.

The finding that a determination other than the judgment in the state court action pleaded as a bar was final is inconsistent with affirmance.

The decision, of the Court of Appeals, states that a judgment was entered in favor of the Taubs on the 13th day of October, 1945 directing Braun to execute a deed of the parcel here in question and "from this judgment Braun appealed to the Appellate Division for the First Department, which affirmed the judgment on May 24th 1946; and upon that order judgment was entered in the Supreme Court on June 13th 1946". A judgment, entered upon the order of the Appellate Division, is not a judgment of Special Term, but of the Appellate Division (*Macomber* v. *Sterling*, 230 App. Div. 598). There can be no such thing as two judgments, against Braun, in the same action, in the same court. It is obvious, therefore, that the judgment, of the Appellate Division entered on June 13th, 1946, superseded the judgment of Special Term entered on the 13th day of October, 1944, and having been superseded, the judgment, now claimed as a bar, is not an existing final judgment. Moreover it further appears that the judgment, asserted to be *res adjudicata*, was modified and as modified affirmed by the resettled order of the Appellate Division dated July 1st, 1946 (fols. 130-138). It must therefore be conceded that the judgment of Special Term pleaded as a bar is neither an existing judgment nor a final judgment. In the State of New York the doctrine of *res adjudicata* is an affirmative defense and must be pleaded and proven (*People ex rel. N. Y. C. R. R. Co.* v. *State*, 264 App. Div. 80, modified on other

grounds 292 N. Y. 717). A party to an action claiming an estoppel by judgment must assume the burden of proving not only the judgment but that the particular point or question, as to which he claims estoppel, was in issue. Therefore the fact that both actions are on the identical claim does not conclude the parties unless the former judgment was renderd on the merits and on the same points as in the action where the bar is asserted. In *Creque* v. *Sears,* 17 Hun 123, the court held it to be fundamental that the evidence in an action to recover real property as in any other action must be confined to the issues raised by the pleadings. The estoppel pleaded cannot be supported by evidence of another and different determination.

POINT VI.

The final determination of the rights of the parties in actions in the State of New York must be a judgment.

The last paper in an action, which finally determines the rights of the parties, in the State of New York, is not, never was and cannot be an order (Section 472 of the New York Civil Practice Act). The statement, in the opinion of the Court of Appeals, so finding, is without the support of a single authority, is brand new law, a reversal of all precedents and in hostility to a long and unbroken line of decisions. It is unnecessary to refer to any but the case of *Van Arsdale* v. *King,* 155 N. Y. 325 and the case of *Whalen* v. *Stuart,* 194 N. Y. 495. In the latter case, upon an appeal from a judgment of dismissal, a judgment of affirmance was entered pursuant to an order, of the Appellate Division, which was subsequently resettled

and the judgment amended by the resettled order. The question, before the Court of Appeals, was whether the resettled order amending the judgment of affirmance without more was the final determination or whether a judgment entered pursuant to the said amended order was required to finally determine the rights of the party and it was decided that the resettled order was not a final determination and entry of a judgment pursuant thereto was necessary for a final determination.

The Court of Appeals erred in interpreting the purpose of the direction contained in the resettled order, dated July 1, 1946, that the judgment of affirmance be amended accordingly, *nunc pro tunc*.

In *Smith* v. *Evans*, 1 Abb. N. C. 396, the court said:

> "It is true that the order of January 4, 1876, directs the modification to be made as of November 19, 1875 but this is only for the purpose of preserving any lien which might have been acquired by the docket of the judgment; it cannot however make notice of entry of a judgment for $492.15, answer as a notice of entry of a judgment for $442.15."

CONCLUSION.

The writ of certiorari should issue.

Dated: New York, April 5, 1949.

Respectfully submitted,

DAVID HAAR,
Attorney for Petitioner.